





N O. 2 2 6 3 7  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GEORGE E. DANIELSON, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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BRIEF FOR APPELLEE

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF THE CASE

The statement prepared by the Trustees appears accurate except that the fine imposed upon David Farrell on May 14, 1962 was \$86,500.00 rather than the \$81,500.00 inadvertently stated [R. 2-4]. <sup>1/</sup> In addition, the Internal Revenue Service transferred to the Registry of the Court on April 8, 1968, \$94,127.53 which according to their calculations is the total tax refund including interest due the Farrells. Their computation also indicates that \$73,174.89 of this figure is attributable to the 1962 operating loss which was not available until January 1, 1963, with

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<sup>1/</sup> "R." refers to Reporter's Transcript.



the remaining \$20,952.64 attributed to operating losses from years prior to 1962.

## II

### ARGUMENT

- A. THE FARRELLS' CARRYBACK LOSS CLAIMS WERE NOT CAPABLE OF BEING TRANSFERRED BY THE ORDER OF NOVEMBER 21, 1962 BECAUSE OF RESTRICTIONS IN THE ORDER.
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Referee Walker's Order of November 21, 1962, specifically excludes from the transfer "property which is exempt from creditors under the laws of the State of California" [R. 62]. The Trustees' Application for the Order contains similar language [R. 47]. The California Code of Civil Procedure Section 688 specifically provides that causes of action are exempt from creditor levy. Thus it is clear by the express terms of the Application and Order that the Farrells' carryback loss claims were not to be included in the property to be transferred to the Trustees.

It is true that the Farrells' accompanying affidavit executed on June 27, 1962 and attached as an exhibit to the Application, states that the property to be turned over to the Trustees excludes "only property which is exempt under any of the subdivision (sic) of the California Code of Civil Procedure #690." [R. 51-52]. However, this limitation on the term "exempt" was not followed in the subsequent Order.



It is also noted that California Code of Civil Procedure Section 688.1 makes it possible for a judgment creditor to place a lien on a cause of action. However, there is no indication that the parties intended to limit the term "exempt" to those items permanently and completely exempt from creditor levy.

A number of exempt items such as wages, motor vehicles, and life insurance proceeds are only conditionally or partially exempt according to California exemption statutes.

In any event, both the Application and Order were drafted by counsel for the Trustees. In case of uncertainty, a contract is construed most strongly against the party who drafted the instrument and caused the uncertainty to exist. Riess v. Murchison (C.A. 9th 1964), 329 F.2d 635, Burr & Ladd, Inc. v. Marlett (1964), 41 Cal. Rptr. 130, 230 Cal. App. 2d 468.

Therefore, any possible uncertainty as to what was meant by "exempt property" should be construed against the Trustees.

The Order of November 21, 1962 states that property acquired by the Farrells after June 27, 1962 is not includable in the transfer [R. 63]. The Application filed on October 8, 1962 also states that after-acquired property shall be free of any claims by the Trustees [R. 47].

The decision of the Tax Court of the United States in granting refunds to the Farrells was not entered until June 29, 1967 [R. 70-72]. On June 27, 1962, the Farrells' right to this refund had not yet come into existence. Indeed that portion of the refund



claim based on losses from the 1962 tax year could not have even been claimed prior to January 1, 1963. The Internal Revenue Code of 1954 provides that an operating loss carryback does not arise until the last day of the taxable year of the taxpayer 26 U.S.C. 172(c). "No claim, but only a prospect or expectation of a claim, to a net loss carryback refund can arise until the end of the taxable year . . . ." Fournier v. Rosenblum (C.A. 1st 1963), 318 F.2d 525, 527. Also see In re Sussman (C.A. 3d 1961), 289 F.2d 76.

Since the Farrells had no property rights in tax refunds existing on June 27, 1962, the refund acquired five years later is clearly after-acquired property not includable in the transfer by the language of the Order.

B. ANY PURPORTED ASSIGNMENT OF THE CARRYBACK LOSS CLAIM TO THE TRUSTEES WOULD BE A VIOLATION OF 31 U.S.C. 203.

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1. Any Purported Assignment Would Be Clearly Voluntary.

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The Courts have found several purposes for the Anti-Assignment Statute originally enacted as R.S. 3477 in 1853. Among these are to save to the United States "defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee". Grace v. United States (D.C. Maryland 1948), 76 F.Supp. 174, 175.





For almost a century, several well-recognized exceptions have been read into the Act. These include transfers resulting by operation of law. United States v. Gillis (1877), 95 U.S. 407.

The rationale for this exception is stated to be the unfairness which would result if a just claim against the United States passed by operation of law, and if the assignee were prevented by the Act from suing on it, and the assignor could not sue since he was no longer the owner. Kinney-Lindstrom, Inc. v. United States (N. D. Iowa 1960), 186 F. Supp. 133, 138.

However, the Courts have consistently applied the Act with vigor where the assignment is voluntary in character. United States v. Shannon (1952), 342 U.S. 288.

In cases where the Courts have determined that transfers legalized by Court order are the equivalent of transfers by operation of law, there is no indication of any otherwise voluntary assignment. For example, in New Rawson Corp. v. United States (Mass. 1943), 55 F. Supp. 291, the conveyance was made pursuant to a state receivership in which there is no indication of any voluntary transfer by the original owner.

In the one case thus far reported, involving an essentially voluntary assignment with title subsequently passing by Court order, the purported assignment was struck down with the Court noting that "while the legal title to the claim passed by Court authority it did not pass by operation of law." Kinney-Lindstrom, Inc. v. United States, 186 F. Supp. 138-139, supra.

In this case, an executrix voluntarily assigned a tax refund



claim with the assignment then receiving the necessary court approval. It was held that the legal title was not taken involuntarily from the executrix and thus was a voluntary assignment on her part interdicted by the Anti-Assignment statute.

Any purported assignment of the tax refund claim by the Farrells to the Trustees would be equally voluntary in character and would not be saved from the provisions of the Anti-Assignment statute by a subsequent Order.

2. Any Purported Assignment Would Be  
Clearly Defective As A General  
Assignment For The Benefit Of  
Creditors.

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As defined by the Courts, a general assignment is a transfer of all or substantially all of the debtor's property to another person in trust to collect any money owing to the debtor, sell and convey the property, distribute the proceeds to his creditors and return the surplus, if any, to the debtor. In re McCrum (C. A. 2d 1914), 214 Fed. 207. Missouri-American Electric Co. v. Hamilton Brown Co. (C. A. 8th 1908), 165 Fed. 283.

It is an act of bankruptcy, 11 U. S. C. 21a(4). The assignment must be for all or nearly all of the debtor's property although minor exceptions will be disregarded. In re Dashiell (C. A. 6th 1917), 246 Fed. 366. Real estate may not be reserved Missouri-American Electric Co. v. Hamilton Brown Co. ,



186 F. Supp. 283, 288, supra.

Such a common law or nonstatutory form of assignment is valid in California only if of the entire assets of the debtor and for the benefits of creditors generally. Jarvis v. Webber (1925), 196 Cal. 86, 236 Pac. 138. Brainard v. Fitzgerald (1935), 3 Cal. 2d 157, 44 P. 2d 336.

The Courts recognize the exception of a general assignment from the provisions of the Anti-Assignment Statute only if it includes all of the debtor's assets and is for the benefit of all his creditors. Goodman v. Niblack (1881), 102 U. S. 556, Butler v. Goreley (1892), 146 U. S. 303.

As the Supreme Court stated in Goodman v. Niblack, 102 U. S. 556, 560, supra, "In what respect does the voluntary assignment by an insolvent debtor of all his effects for the benefit of all his creditors, which effects must, if the assignment is honest, include a claim against the government, differ from the assignment which is made in bankruptcy?"

The purported assignment before us is clearly not a general assignment excepted from the provisions of the Anti-Assignment Statute. The Trustees represent only creditors filing claims against a bankrupt entity known as the Los Angeles Trust Deed and Mortgage Exchange as distinguished from the creditors of the Farrells.

The terms of the Application and Order specifically reserve substantial amounts of both real and personal property to the Farrells. The Application states that the value of nonexempt



property thus reserved is estimated at \$15,000.00 [R. 49].

Thus, the purported Assignment is fatally defective as a General Assignment on at least two grounds and is thus not removed from the restrictions of the Anti-Assignment Statute.

### CONCLUSION

The order of the District Court is correct and should be affirmed.

Respectfully submitted,

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